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No. 194.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

C. V. BROWNE, PETITIONER,

VS.

THE UNION PACIFIC RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY BRIEF OF PETITIONER.

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Petitioner desires to reply briefly to the points raised by respondent in its brief.

I.

Respondent first contends that the decision herein of the Kansas Supreme Court can be rested upon issues of local pleading and practice without involving any Federal question and that therefore the Writ of Certiorari should not have been granted herein.

It will be noted however, from the opinion (Tr. 16), that such decision is based solely upon an interpre-

tation and construction of the Pomerene Act. In the Kansas Supreme Court the syllabus of a decision is written by the court and Section 1 thereof shows clearly the basis of the decision which this court has consented to review. And in its opinion the Kansas Supreme Court says (Tr. 19):

> "Plaintiff contends that the text and effect of this act (Pomerene Act) is to make shipper's order bills of lading unqualified negotiable instruments. The act does not specifically so declare, although it does clothe them with certain attributes of negotiable instruments within the meaning of this act."
>
> "A careful reading of the federal statute discloses no language which by fair intendment can be said to impose a liability on the carrier in favor of an innocent transferee of an order bill, for inaccurate or incomplete dating thereof; * * * It follows that insofar as defendant's demurrer involved the *question chiefly urged here*, the ruling of trial court was correct."

The ruling on matters pleaded in defendant's Answer to which the plaintiff demurred is patently based on the conclusion, previously reached, that the Pomerene Act does *not* make order bills "unqualified negotiable instruments." Had such conclusion been otherwise, and had it been held that Section 22 of the act applies to misdating of order bills, then certainly the petition in the trial court stated a cause of action against respondent carrier and in favor of petitioner, the holder of the order bills, who had given value therefor in reliance on the datings thereof, for damages caused by their misdating.

And in such case, it could constitute no defense to petitioner's action for recovery of such damages, that the carrier had no notice of how such damages might arise or what they would be or that it was the custom for the carrier to allow its order bills to be prepared by the shipper who imposed upon its agent and that it was without the scope of its agent's authority to issue order bills containing erroneous statements, or that petitioner might have suspicioned that respondent's agent had misdated the order bills in question from the fact that the cars of wheat were slow in moving from Idaho to Texas.

Having ruled that the Pomerene Act had no application, and hence that respondent might plead all defenses that were good prior to its enactment, it became necessary for the Kansas Supreme Court to then rule whether the parts of the answer demurred to constituted such defense; and that is all that such court did.

The Kansas Supreme Court met squarely the issue as to whether order bills are negotiable or merely quasi-negotiable. And with its decision standing unreversed, the only liability in Kansas of a carrier to a dealer or banker who advances money in reliance on the recitations of an order bill is for false statements as to the amount of goods received or as to their kind, sort or species. And those who, in commercial transactions, are damaged because of reliance upon other false statements, such as date or place of shipment, routing, or prepaid freight, are without recourse.

And it was this far-reaching construction of the Pomerene Act which this court has seen fit, by certiorari, to review.

The decision of the Kansas Supreme Court, being based squarely on its construction of the Pomerene Act, could not be rested upon matters of state practice as contended by respondent in the following lettered paragraphs of its brief:

(a) The question whether Browne was required to accept the shipments under his contract with Past, even had the order bills correctly shown that they were out of time, necessarily had to be raised by demurrer to his petition, not by his demurrer to the answer. But the petition alleges (Tr. 4) that he *did* rely on the dates in the order bills and that he would *not* have paid the drafts to which they were attached had they been correct. So under the Pomerene Act a demurrer to the petition on that ground, even had one been filed, could not have been sustained.

(b) As to the fourth paragraph of the answer (Tr. 10), it will be noted that respondent does not deny therein the allegation of the petition that it was within the scope of its agent's authority to issue bills of lading, but merely alleges that it was not within the scope of his authority to issue bills *"containing any false or erroneous statements."*

And certainly if Section 22 of the act applies to the facts herein, such allegations could constitute no defense to petitioner's cause of action.

(c) And if order bills *are* negotiable, a purchaser thereof is justified in relying on their recitations as to dates of shipment, regardless of suspicions, surmise or conjecture based on the extremely variable time that it might take for a car of wheat to move from Idaho to Sherman, Texas. Respondent's answer did not allege that petitioner knew of its fraud, but merely that he might have suspicioned same because the wheat had not yet arrived when he took up the drafts with order bills attached.

If petitioner was justified, under the Pomerene Act, in relying on the recitations of the order bills, then it would constitute no defense herein that he might have suspicioned that such order bills were false. The rulings of the Kansas Supreme Court are all based on its conclusion that the Pomerene Act, has no application to the facts herein. If that conclusion is correct, then such rulings are also correct. But the whole decision is based on the Federal question of the application and construction of the Pomerene Act.

II.

Respondent next contends that as it denied knowledge by usage and custom, or otherwise, that the shipments in question were to be applied on contract, petitioner could not recover special damages, and no general damages were pleaded.

If the Pomerene Act applies to the facts pleaded herein, then respondent would be liable to petitioner for the damages caused by the misdescription contained in

the order bills. And such damages would be what petitioner lost as a result of his misplaced reliance. As said in *C. M. & St. P. Rly. Co.* v. *McCaull-Dinsmore,* 253 U. S. 96:

> "The rule of the common law is not an ordinary fiat, but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed."

The petition shows (Tr. 8) that Browne paid Past's drafts, with order bills attached and in reliance thereon, for $9950.00 and paid $1651.16 freight charges, or a total of $11,601.16. If the order bills had not been misdated he would have received therefor from the Gladney Mill the sum of $12,117.60. But because of the misdating he was able to realize out of the order bills, and the wheat they represented, but $8709.52, less demurrage of $607.00 or a net to him of but $8102.52. This was $4,015.08 less than he *should* have gotten for the wheat and $3498.64 less than he *actually paid out for it.* So regardless of his sale contract, or respondent's knowledge thereof, the pleadings do show that petitioner suffered actual damages of $3498.64.

This action was not brought to recover damages for delay in transportation, as is indicated by respondent, but to recover the actual damages suffered by petitioner and caused by the failure of the shipments to correspond with their descriptions in the order bills, a liability specifically placed on carriers by Section 22 of the Pomerene Act.

And even had the carrier not had knowledge that the shipments in question were to be applied on contract, it would be liable, under the act, for the loss to petitioner of what he would have had, had the order bills contained no untrue statements.

III.

Respondent further contends that the expression, "Description of the goods," used in the Pomerene Act, refers merely to a recital of their kind, sort or species, as held by the Kansas Supreme Court. In quoting Section 22 of the Act, on page 11 of its brief, respondent omits the words—"relying upon the description therein of the goods"—which immediately follow the provision that a carrier shall be liable to the holder of an order bill who has given value in good faith. And these omitted words are necessary in construing the section.

The very fact that the act makes a carrier liable for *non-receipt* of the goods to one who has given value for an order bill in reliance upon the *description* therein of the goods, indicates that Congress itself extended the meaning of the words, "description of the goods," beyond a mere recital of their sort, kind or species and to include their bulk weight. And it is no broader extension of the meaning of these words to include "date of shipment" than to include "bulk weight."

In the excellent brief filed herein by Luthur M. Walker as *amicus curiae*, it is very clearly shown that the courts of this country and of England have definitely held that the date of their shipment is a *part of the description of the goods.*

As Congress is presumed to have known, when it enacted the Pomerene Act, of the decision of this court in *A. T. & S. F. Rly. Co.* v. *Harold,* 241 U. S. 371, holding that order bills were not negotiable, and of the various judicial decisions that the date of shipment comprises a part of the description of goods shipped, it seems very clear that the Pomerene Act does make carriers liable for damages resulting from misdating of order bills and that the description of goods referred to in Section 22 thereof includes the date of their shipment.

The decision of the Kansas Supreme Court herein, affirming the rulings of the trial court, was based squarely upon its construction of the Federal Bill of Lading Act of 1916, and not upon issues of local pleading and practice. And such decision was erroneous in that it held that interstate order bills of lading are not strictly negotiable and that the date of shipment of goods does not comprise a part of their description.

Respectfully submitted,

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